NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2011 CA 1140

JFW
JTP by JFW

DANA WASHAM MARKS

VERSUS

STEPHEN R. MARKS

Judgment Rendered: DEC 2 1 2011

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Appealed from the
Twenty-Second Judicial District Court
In and for the Parish of St. Tammany, Louisiana
Trial Court Number 2010-14859

Honorable Dawn Amacker, Judge

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BEFORE: PETTIGREW, McCLENDON, AND WELCH, JJ.

McClendon, J. Concurs. I agree with the result reached by the majority.

WELCH, J.

Dana Washam Marks appeals a trial court judgment sustaining the peremptory exception raising the objection of no cause of action filed by Stephen R. Marks and dismissing her petition to rescind a community property settlement. We reverse the judgment of the trial court and remand for further proceedings.

FACTUAL AND PROCEDURAL HISTORY

On November 14, 2008, a consent judgment partitioning the community property existing between Dana and Stephen Marks was signed by the trial court. This consent judgment provided that the parties "ha[d] conferred and ha[d] reached an amicable agreement regarding the partition of the assets of their former community" and that "[t]he parties desire[d] to settle and liquidate the community ... as set forth in this agreement." Almost nine months later, on August 6, 2009, a judgment of divorce was granted in favor of Stephen Marks.

On July 29, 2010, Dana Marks filed a petition to rescind the community property settlement, alleging that she was not represented by counsel when she entered into the consent judgment and that she received a disproportionate share of community assets. Specifically, Dana Marks claimed that the value of the assets she received was less by more than one-fourth of the fair market value of the portion she should have received as a result of the partition, and therefore, sought rescission of the consent judgment partitioning the community property on account of lesion. In response, Stephen Marks filed a peremptory exception raising the objections of no cause of action and *res judicata*, asserting that the consent judgment partitioning the community was a judicial partition that could not be set aside on the basis of lesion and that Dana Marks had not appealed the November 14, 2008 consent judgment, and as such, the judgment was final and had acquired the authority of a thing adjudged.

Following a hearing on November 22, 2010, the trial court rendered

judgment sustaining the objection of no cause of action and finding the objection of *res judicata* moot. A judgment reflecting the trial court's ruling was signed on December 20, 2010, and it is from this judgment that Dana Marks appeals.

LAW AND DISCUSSION

In reviewing a trial court's ruling on an exception of no cause of action, the appellate court should subject the case to *de novo* review because the exception raises a question of law, and the trial court's decision is based only on the sufficiency of the petition. **Fink v. Bryant**, 2001-0987 (La. 11/28/01), 801 So.2d 346, 349. The peremptory exception raising the objection of no cause of action is designed to test the legal sufficiency of the petition by determining whether the plaintiff is afforded a remedy in law based on the facts alleged in the pleading. **Fink**, 801 So.2d at 348-349. The function of the objection of no cause of action is to question whether the law extends a remedy to anyone under the factual allegations of the petition. **Fink**, 801 So.2d at 348. No evidence may be introduced to support or controvert the objection that the petition fails to state a cause of action. **Fink**, 801 So.2d at 349. The exception is triable on the face of the papers, and for the purposes of determining the issues raised by the exception, the well-pleaded facts in the petition must be accepted as true. *Id.* A petition should not be dismissed for failure to state a cause of action unless it appears beyond doubt that the plaintiff can prove no set of facts in support of any claim. *Id.* Any doubt as to the sufficiency of the petition must be resolved in favor of the plaintiff or the sufficiency of the petition to state a cause of action. **Taylor v. Sider**, 99-2521 (La. App. 4th Cir. 5/31/00), 756 So.2d 416, 418.

"A spouse has the right to demand partition of former community property at any time. ... If the spouses are unable to agree on the partition, either spouse may demand judicial partition which shall be conducted in accordance with [La.] R.S. 9:2801." La. C.C. art. 2369.8. In other words, the spouses may partition

former community property by contract or judicially, just as ordinary co-owners; however, if the partition is done judicially, the special procedures of La. R.S. 9:2801 are applicable rather than the general provisions governing co-ownership. La. C.C. art. 2369.8, comment (b); **Junca v. Junca**, 98-1723 (La. App. 1st Cir. 12/28/99), 747 So.2d 767, 770, writ denied, 2000-1120 (La. 6/2/00), 763 So.2d 601.

Louisiana Civil Code article 814 permits the rescission of an "extrajudicial partition" on the basis of lesion "if the value of the part received by a co-owner is less by more than one-fourth of the fair market value of the portion he should have received."[1] However, a judicial partition is not subject to being set aside under this provision. **Lapeyrouse v. Lapeyrouse**, 98-0271 (La. App. 1st Cir. 2/19/99), 729 So.2d 682, 684. A consent judgment that partitions community property is generally considered a judicial recognition of an extrajudicial partition; however, under certain circumstances, it may constitute a judicial partition. In order for a consent judgment to constitute a judicial partition, our jurisprudence requires more than judicial authorization, recognition, or incorporation of the community property settlement into the judgment. See *Id.*; **Sanders v. Sanders**, 2006-1401 (La. App. 1st Cir. 5/4/07), 961 So.2d 464, 468; **Junca**, 747 So.2d at 770-771; **Wurtzel v. Wurtzel**, 2003-902 (La. App. 5th Cir. 12/30/03), 864 So.2d 727, 729, writ denied, 2004-0280 (La. 3/26/04), 871 So.2d 353. In **Junca**, 747 So.2d at 770, this court explained that "if the partition is done judicially, the special procedures of [La. R.S.] 9:2801 are applicable." This court then concluded that the consent judgment incorporating a community property settlement only became a judicial partition after suit for partition was filed pursuant to La. R.S. 9:2801, several property issues were disputed, litigation was progressing under the provisions of

[1] See La. C.C. art. 2369.1 providing that after the termination of the community, the provisions governing co-ownership apply to former community property.

La. R.S. 9:2801, stipulations were then entered, and the partition was adopted and made a judgment of the court. *Id.* "Once this was accomplished, the partition became a judicial partition not subject to being set aside on account of lesion under [La. C.C. art.] 814." *Id.* See also **Lapeyrouse**, 729 So.2d at 684.

In this case, Dana Marks alleged that the value of the assets she received by virtue of the November 14, 2008 consent judgment was less by more than one-fourth of the fair market value of the portion she should have received as a result of the partition. The November 14, 2008 consent judgment was entered into prior to the rendition of the judgment of divorce and specifically provided that the parties (*i.e.*, Stephen Marks and Dana Marks) had conferred and reached an amicable settlement regarding the partition of the assets of their community and that they desired to settle and liquidate the community as set forth in the agreement. However, from the record that is before us, we do not know whether either of the parties had sought, pursued, or instituted a proceeding for judicial partition of community property pursuant to La. R.S. 9:2801 or if any disputed community property claims were ever presented to or pending in the trial court. Thus, we are unable to determine if the November 18, 2008 consent judgment is a judicial partition, which would not be subject to attack on account of lesion, or if it is simply a judicial recognition of an extrajudicial partition, which would be subject to attack on account of lesion.

Therefore, solely for the purposes of resolving the issues raised in Stephen Marks' peremptory exception raising the objection of no cause of action, if we accept all of the allegations of fact alleged in Dana Marks' petition as true and resolve any doubts as to the nature of the consent judgment in favor of Dana Marks or the sufficiency of the petition to state a cause of action (*i.e.*, that the consent judgment is a judicial recognition of an extrajudicial partition), we must conclude that Dana Marks has stated a cause of action to rescind the community property

settlement agreement on account of lesion. As such, the trial court erred in sustaining Stephen Marks' peremptory exception raising the objection of no cause of action and in dismissing Dana Marks' petition. The December 20, 2010 judgment of the trial court is reversed.

Additionally, we note that the trial court did not rule on Stephen Marks' peremptory exception raising the objection of *res judicata*, having concluded that the objection was moot based on its ruling on the objection of no cause of action. Therefore, we remand this matter for further proceedings for a ruling on the objection of *res judicata*.

CONCLUSION

For all of the above and foregoing reasons, the December 20, 2010 judgment of the trial court sustaining Stephen Marks' peremptory exception raising the objection of no cause of action and dismissing Dana Marks's petition to rescind the community property settlement is reversed. This matter is remanded for further proceedings in accordance with the views expressed in this opinion.

REVERSED AND REMANDED.